

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

AUG 17 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0066-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
RICHARD MARTINEZ,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20080065

Honorable Gus Aragón, Judge

REVIEW GRANTED; RELIEF DENIED

Richard Martinez

Florence
In Propria Persona

ESPINOSA, Judge.

¶1 Petitioner Richard Martinez challenges the trial court's ruling on his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review, and, for the following reasons, we deny relief.

¶2 After pleading guilty, Martinez was convicted of four counts of armed robbery and seven counts of aggravated assault, all dangerous-nature offenses, and two

counts of weapons misconduct. The trial court sentenced him to presumptive terms of imprisonment, some concurrent and some consecutive, for a total of twenty-one years. In his of-right petition for post-conviction relief, Martinez challenged the state's voluntary re-submission of charges to the grand jury to obtain a redetermination of probable cause in response to Martinez's "Motion to Dismiss, or Alternatively Remand for a Redetermination of Probable Cause."¹ He also argued the state had breached its agreement that, in exchange for his plea of guilty, it would refrain from making any recommendation regarding his sentence. Finally, he argued his counsel was ineffective in failing to object to the grand jury procedure followed or to the state's recommendation that the court impose consecutive sentences. As relief for these claims, he sought leave to withdraw his plea of guilty.

¶3 In response, the state disputed Martinez's contention that the grand jury proceeding had been flawed. Although the state conceded it had "unintentionally breach[ed]" its agreement with Martinez when a "covering" prosecutor had recommended consecutive sentences, it argued permitting Martinez to withdraw his guilty plea was "an inappropriate remedy."

¶4 After a hearing, the trial court ruled Martinez was entitled to relief on his claim that the state had breached its agreement at sentencing. But the court denied Martinez's request to withdraw his guilty plea, finding he had failed to show such a withdrawal was required to correct a "manifest injustice." *See* Ariz. R. Crim. P. 17.5.

¹In that motion, Martinez alleged the state's presentation to the grand jury had included misleading testimony and had omitted exculpatory evidence.

Instead, the court directed that Martinez's case be reassigned to a new judge for resentencing. Noting that "[d]efense counsel's alleged ineffectiveness at sentencing because of the breached plea agreement has been addressed by the grant of resentencing," the court found Martinez's other claims were without merit and denied them. After Martinez notified the court he wished to reject the resentencing relief afforded, and based on a stipulation by the parties, the court stayed its order pending Martinez's petition for review to this court. Martinez's pro se petition for review followed.

¶5 In this petition, Martinez relies on the same arguments he raised below.² He also challenges the resentencing remedy ordered by the court. "We will not disturb a court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no abuse of discretion here.

¶6 We are satisfied with the trial court's identification, analysis, and resolution of Martinez's claims and see no need to restate or embellish its ruling. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App.1993) (when trial court has correctly identified and ruled on issues raised "in a fashion that will allow any court in

²To the extent Martinez argues the trial court abused its discretion in "denying [his] request to dismiss [the] indictment with prejudice," we note no such request was made in his petition for post-conviction relief, and we will not consider such a claim on review. *See* Ariz. R.Crim. P. 32.9(c)(i) (petition for review to contain issues "decided by the trial court ... which the defendant wishes to present to the appellate court for review"); *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App.1980) (appellate court does not consider issues in petition for review that "have obviously never been presented to the trial court for its consideration").

the future to understand the resolution[, n]o useful purpose would be served by this court[']s rehashing the trial court's correct ruling in a written decision").

¶7 We add only two points to the trial court's sound analysis. First, although we agree with the court that Martinez's challenge to the grand jury proceedings was without merit, this claim also was waived by his guilty plea and therefore was precluded. *See State v. Flores*, 218 Ariz. 407, ¶ 6, 188 P.3d 706, 708-09 (App. 2008) (pleading defendant waives all non-jurisdictional claims arising from alleged errors or defects antedating plea); *State v. Reed*, 121 Ariz. 547, 548, 592 P.2d 381, 382 (App. 1979) (state's alleged failure to disclose exculpatory evidence to grand jury non-jurisdictional defect waived by pleading defendant); *see also* Ariz. R. Crim. P. 32.2(a)(3) (defendant precluded from relief based on any ground "waived at trial, on appeal, or in any previous collateral proceeding").

¶8 Second, we reject Martinez's argument that he "should be allowed to withdraw from the plea agreement" because he "did not receive[] the benefit" of the state's bargain. The trial court's direction that Martinez be resentenced by a different judge is an appropriate response to that assertion. *See Puckett v. United States*, ___ U.S. ___, ___, 129 S.Ct. 1423, 1430 (2009) (rescission "not the only possible remedy" for government's breach of plea agreement); *Santobello v. New York*, 404 U.S. 257, 263 (1971) (case remanded to determine proper remedy for breach; specific performance of agreement, via resentencing by different judge, may be sufficient).

¶9 Martinez has failed to sustain his burden of persuading us the trial court abused its discretion in ruling on his claims or in granting relief. *See Swoopes*, 216 Ariz.

390, ¶ 4, 166 P.3d at 948 (appellate court will not disturb trial court's ruling on Rule 32 petition unless defendant establishes abuse of discretion). Accordingly, although we grant review, we deny relief.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge